(1)

FILED

No. 03-7017 JUN 16 2004

In The

Supreme Court of the United States

Tod N. Rockefeller
Petitioner,
v.
Westinghouse, Waste Isolation Division, a division of CBS Corp., and George Dials, Individually
Respondents.

On Appeal to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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END

Questions Presented

1. Whether this Court will resolve a conflict between the Ninth and DC Circuits, concerning the standing of a False Claims Act ("FCA") relator ?

2. Whether this Court will determine that the doctrine of admission-by-silence does indeed apply to this case ?

3. Whether or not this Court will determine that FCA liability can be transferred from one corporation to another ?

Parties Proceeding

Petitioner was plaintiff (00-1352 RBW) in the DC District Court ("D.C. "), and subsequently Appellant to the U.S. CoA for the DC Cir. (03-7120).

Respondent is CBS Corporation.

Respondent's contact is through their counsel:
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Table of Contents

Question Presented	i
Parties to Proceeding	ii
Table of Authorities	iii
Rules /Jurisdiction	iii
Constitutional Provisions at Issue	iii
Statement of the Case	1
Argument	1 thru 6
Appendix 1	A-1
Appendix 2	A-2
Appendix 3	A-4
Appendix 4	A-5
Appendix 5	A-6 thru A-22
Appendix 6	A-23 thru A-35

Table of Authorities

CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. V

U.S. Const., Amend. VII

STATUTES

28 U.S.C. § 1254 (1)

31 U.S.C. § 3729 et seq.

CASES

Shekoyan v. Sibley Intn'l Corp., No. 00-2519 RBW, Sec.(C)(1) (D.D.C., Aug. 19, 2002);

Steel Co. v. Citizens for a Better Envir., 523 U.S. 83, 127-28 (1998);

United States v. Andrus, 775 F.2d 825, 834-40 (7th Cir.1985);

U.S. ex rel. Joseph v. Cannon, et al., 642 F.2d 1373, 1385 (D.C. Cir. 1981);

U.S. ex rel. Kelly v. The Boeing Co., 9 F.3d 743, 745 n.2 (9th Cir.1993);

U.S. ex rel. Newsham v. Lockheed, Inc., 722 F.Supp. 607, 612 (N.D.Cal. 1989);

U.S. ex rel. Trice v. Westinghouse Hanford Co., 2000 U.S. Dist. LEXIS 8838 (E.D.Wa., March 1, 2000);

Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 773-74, 776-77 n.5,6,7 (2000).

Rules

Supreme Court ("Sup.Ct.") Rules 10(a), 10(c), 14.1

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). The U.S. CoA for the DC Cir. denied Petitioner's Petition for Rehearing En Banc (03-7120) with an Order filed on APR 9, 2004.

Constitutional Provisions at Issue

Fifth Amendment Right of Due Process of Law

Seventh Amendment Right of Trial by Jury

Statement of the Case

This case involves the FCA claims of Petitioner, stemming from his service as an Environmental Scientist with the United States ("U.S.") Dept. of Energy ("DOE") at the Waste Isolation Pilot Plant ("WIPP") in southern New Mexico. While at the WIPP, the goal of Petitioner was to accomplish the mission of the project in a cost-effective manner. It had been clearly and specifically outlined to the D.C. that Petitioner was indeed the "original source" of the claims within his Complaint [00-1352 RBW]. See 31 U.S.C. § 3730(e)(4).

Argument

Question 1.

The DC Cir. ruled that: "appellant has not shown that the D.C. committed obvious error in holding that qui tam relators may not proceed pro se."[1] App. 2 at A-3. The D.C.'s Memorandum Opinion notes that Petitioner had "conceded that he cannot proceed pro se in this case . . . ." App. 5 at A-9. While this is true at first, Petitioner had not yet had the opportunity to review this Court's *Vermont* case, and the 9th Cir.'s ruling in *Kelly*, among many other related cases. Since Petitioner had great difficulty in obtaining said cases above, and the tremendous task of reviewing so many cases by Petitioner [a non-lawyer], a timely Motion for Enlargement of Time was filed. Petitioner's said Motion requested only a meager seventeen (17)

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1. The DC Cir., within the same Order, noted that "the merits of the D.C.'s June 26 order granting appellee's motion to dismiss are not before this court, ..." Petitioner had subsequently detailed to the D.C. Cir., that the D.C. had violated the Cir.'s own precedent [*Fox v. Strickland*, 837 F.2d 507], and had improperly denied a timely Motion for Enlargement of Time in the process of issuing the June 26 order. Therefore, the merits of the June 26 order should very well have been before the DC Cir.. See App. 6 at A-23 through A-26.

days so that he would have some chance to review the case law, to be able to formulate a response to the Motion to Dismiss (henceforth "MtD") his Complaint. Again, see App. 6 at A-23 through A-26.

After Petitioner had the opportunity to review said case law above, he came to a conclusion. He realized that there was significant support for the proposition that FCA cases were indeed "assignable" "fraud claims", that Petitioner had standing for the prosecution of such himself. See *Kelly*, 9 F.3d at 748; See also *Vermont*, 529 U.S. at 773. The D.C. ruled that a FCA relator is only partially assigned the U.S.'s damage claims, and has rights only "to the part of the claim that is assigned . . . ." App. 5 at A-19. Also, the D.C. ruled that, since a relator could not separate his own portion of the FCA case out independently, the case is never the relator's own case that would be able to be prosecuted on a pro se basis. *Id* at A-19, A-20. The DC Cir. has adopted the stance of the D.C. as correct [that the said partial assignment is controlling].

The DC Cir.'s denial of App. 6 directly conflicts with the ruling of the 9th Cir. in the *Kelly* case. It is stated by the 9th Cir. that:

> "We are unconcerned . . . that the qui tam plaintiff is only assigned part of the government's claim, and the government retains the right to intervene."

Kelly, 9 F.3d at 748. Since the *Kelly* case in 1993, the 9th Cir. has consistently allowed FCA cases to be prosecuted by pro se relators after the government had chosen not to intervene. See *U.S. ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995); *U. S. ex rel. Devlin v. County of Merced, CA*, 1996 U.S.App. LEXIS 17681 (9th Cir. 1996); *Bly-Magee v. State of Calif.*, 236 F.3d 1014 (9th Cir. 2001); and *U.S. ex rel. Giles v. Pratt, et al.*, 32 Fed. App. 432; 2002 U.S.App. LEXIS 5067 (9th Cir. 2002)

The cases above confirm all of what the *Trice* Court interpreted, concerning the 9th Cir.'s ruling in *Kelly*, to allow a FCA pro se relator to prosecute the case, when the government has chosen not to intervene. E.g.: " ". . . in the area of Government fraud, there appears to be a great unwillingness to expose illegalities." S. Rep. No. 345 at 4, reprinted in 1986 U.S.C.C.A.N. at 5269." *Kelly*, 9 F.3d at 745 n.2 Petitioner had extensively outlined the *Trice* Court's ruling in this regard. See App. 6 at A-30, A-31.

In summary, the following points reflect the intent of Congress within the 1986 amendments to the FCA: 1) the amendments were designed to encourage more private enforcement; 2) along with this design, was the knowledge that the government would be very reluctant to intervene; 3) given nos. 2 &3 above, Congress desired to have more private enforcement that they knew would often not include government intervention.

These conditions certainly support the ruling of the *Trice* Court [of the post 1986 FCA] that:

> ". . . . the FCA meticulously addresses the procedure by which a qui tam plaintiff may bring an action. Congress could easily have inserted a provision requiring a qui tam plaintiff to retain counsel [but did not]."

See *Trice*, No. 96-0171 at Sec. VI. Since the FCA is quite unique, and its uniqueness given rise to this instant conflict between the 9th Cir. and the DC Cir., conflicts are likely to continue to arise.

Question 2.

Within the MtD (doc. 16), a claim was made that Petitioner had failed to satisfy the requirements of Fed.R.Civ.P . Rule 9(b). Said Rule requires allegations of fraud to be made with the requisite "particularity". MtD at 14. In response to the MtD Petitioner, first, had outlined allegations of fraud

that were within the Complaint, and had included eight exhibits of evidence taken from the disclosure materials, which further elaborated the alleged fraud. Said disclosure materials had been provided to the government when the Complaint was initially filed as the FCA requires. Petitioner's Opposition (doc. 24) to the MtD, had included a Certificate of Acknowledgment for Self-Authentication per Fed.R. Evid. Rule 902(8) for each exhibit. In addition, this evidence was introduced along with a sworn affidavit as Fed.R.Civ.P. Rule 56(e) requires.

Concerning the format and presentation of said evidence, to meet the requirements of Rule 9(b), Petitioner followed the guidance provided by the precedent set by the DC Cir. itself. Petitioner's allegations of fraud included:

> "the circumstances constituting fraud . . . stated with particularity" by including "the time, place and content of the false misrepresentations, . . . and what was obtained or given up as a consequence of the fraud."

See *U.S. ex rel. Joseph*, 642 F.2d at 1385. The D.C. had ruled essentially the same as the DC Cir. in regard to the "particularity" requirements above. In addition, however, the D.C. had ruled, in a case very similar to Petitioner's case, that the plaintiff was allowed to meet the requirements of Rule 9(b) by "legal memoranda". See *Shekoyan*, No. 00-2519 (RBW) at Sec. III(C)(1). The D.C. had ruled that:

> ". . . , courts have allowed, for Rule 9(b) purposes, a party to supplement its complaint through such legal memoranda . . . . For example, in *Bonilla v. Trebol Motors Corp.*, 150 F.3d 77, 81 (1st Cir. 1988), the 1st Cir. treated the plaintiff's summary judgment opposition . . . , as a de facto amendment to the fraud allegation . . . ."

See *Id.* Petitioner's fraud allegations, for example, were outlined to the D.C. as follows:

> "CBS's Cost Account Manager Mr. J. R. Stroble fraudulently related to Plaintiff, on August 29th, 1997, that the annual lease charge for the FTIR VOC Monitoring equipment was $386,000 for FY98. . . . . Plaintiff opposed the continued leasing of the FTIR equipment especially at that high claimed cost. CBS certainly made "certifications" that were "false" "regarding lease and purchase options" of the FTIR equipment. See Pl.MiO at 6, 7; Disclosures at 049, 055 - 058."
>
> "CBS refused to purchase the FTIR equipment from Radian International Corporation of Austin, Texas for the subcontract option of $78,000 for the FTIR equipment . . . . Rather, CBS fraudulently billed the Government $386,000 for leasing of the FTIR equipment for FY98. CBS claims that this information is not "accurate", but makes no effort to substantiate this claim, . . ." Doc. 47 at 7, 8.

The silence of the Respondent towards this fraud constitutes an adoptive admission per Fed.R.Evid. 801(d)(2)(B). See *United States v.Andrus*, 775 F.2d 825, 839-40 (7th Cir. 1985).

Question 3.

Within the FCA Complaint of Petitioner, the entity alleged to have made the fraudulent claims, during FY97 through FY99 [period of alleged fraud], is CBS Corp. d/b/a Westinghouse, Waste Isolation Division (henceforth "CBS"). CBS was the entity served with the Complaint, and that which hired counsel and responded. During the period of

alleged fraud, CBS was the maintenance and operating ("M&O") contractor at the facility where the fraud occurred. The counsel of CBS has been repeatedly claiming that the proper party defendant for this Complaint is the current M&O contractor, Washington TRU Solutions LLC, which is owned by British Nuclear Fuels Limited ["BNFL"]Nuclear Services, Inc.. During the period of alleged fraud [FY97-FY99], BNFL had NO affiliations with the division of CBS that made the alleged fraudulent claims to the government. The question is, can FCA liability be transferred from a company that committed fraud to a different company that had no connection to the alleged fraud when it occurred ? The FCA has no provision that outlines the possibility of CBS's claim. Who is liable for the fraud above, CBS or BNFL ?

Prayer for Relief

Petitioner prays that this Court grant this instant Petition to resolve the conflict, described above, between the DC Cir. and the 9th Cir..

Respectfully submitted,

s/Tod N. Rockefeller
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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-7120 September Term, 2003
00cv01352

TOD N. ROCKEFELLER,
ex rel U.S.A.
Appellant

v.

Filed On:
APR 9 2004

WASHINGTON TRU SOLUTIONS
LLC and George Dials, Individually,
Appellees.

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges.

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/Nancy G. Dunn
Deputy Clerk

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-7120 September Term, 2003
00cv01352

TOD N. ROCKEFELLER,
ex rel U.S.A.
Appellant,

v.

Filed On:
JAN 21 2004

WASHINGTON TRU SOLUTIONS
LLC and George Dials, Individually,
Appellees.

BEFORE: Rogers, Tatel, and Roberts, Circuit Judges.

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply; and the motion for sanctions, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987)(per curiam). The notice of appeal and amended notice of appeal were filed on August 28, 2003 and August 29, 2003 more than 60 days after the June 26, 2003, entry of judgment, but within 60 days of entry of the August 5, 2003 order denying reconsideration. See Fed.R.App.P. 4(a)(1), (4). Appellant's Motion for Reconsideration was filed more than ten days after

entry of judgment, and therefore did not toll the time for appealing the June 26 order. See Fed.R.Civ.P. 59(e). Thus, the merits of the district court's June 26 order granting appellee's motion to dismiss are not before this court, and the August 5 order denying reconsideration is reviewed for abuse of discretion. See *Browder v. Director, Illinois Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1987). Even assuming that an error in legal reasoning may be corrected by a Rule 60(b)(1) motion, see *Computer Professionals for Social Responsibility v. United States Secret Serv.*, 72 F.3d 897, 903 (D.C. Cir. 1996), appellant has not shown that the district court committed obvious error in holding that qui tam relators may not proceed pro se. See *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465, 471 & nn.7-8 (5th Cir. 1998) (Rule 60(b) relief not warranted where legal question is arguable rather than an obvious error of law), cert. denied, 526 U.S. 1005 (1999). It is

FURTHER ORDERED that the motion for sanctions be denied.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until after seven days after the resolution of any timely petition for rehearing en banc. See Fed.R.App.P. 41(b); D.C. Cir. Rule 41.

Per Curiam

s/Rogers, Tatel,and Roberts [Initials]

APPENDIX 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA
ex rel. TOD N. ROCKEFELLER,

Plaintiff,

v.

Doc. 44

Civ. No. 00-1352

WESTINGHOUSE ELECTRIC CO., WASTE ISOLATION DIV., **a division of CBS CORP.**, and GEORGE DIALS, Individually,

Defendants.

FILED
JUN 26 2003

ORDER

This matter comes before the Court on the United States' Written Consent to Dismissal of False Claims Act Claims Without Prejudice to the Government, following the issuance of this Court's June 23, 2003 Memorandum Opinion and Order, which afforded the United States government the opportunity to either file a written consent to the dismissal without prejudice of the plaintiff's claims that were filed under the False Claims Act ("FCA") or move to intervene in this case. As the Court explained in its Memorandum Opinion, a pro se plaintiff is unable to proceed in a FCA action without the intervention of the United States. Accordingly, because the United States has filed a written consent to the dismissal of this action, and for the reasons set forth in the Memorandum Opinion, it is hereby **ORDERED** that plaintiff's claims under the FCA are **DISMISSED WITHOUT PREJUDICE.**

SO ORDERED this 25th day of June, 2003.

s/Reggie B. Walton
United States District Judge

APPENDIX 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA
ex rel. TOD N. ROCKEFELLER,

Doc. 40

Plaintiff,

v. Civ. No. 00-1352

WESTINGHOUSE ELECTRIC CO., WASTE ISOLATION DIV., **a division of CBS CORP.**, and GEORGE DIALS, Individually,

FILED
JUN 23 2003

Defendants.

ORDER

Upon consideration of the defendant's motion to dismiss this case, the plaintiff's concession that he is unable to prosecute a claim under the False Claims Act ("FCA") in a pro se capacity, and for the reasons set forth in the Memorandum Opinion accompanying this Order, it is hereby

ORDERED that the United States of America shall be given the opportunity to either file a written consent to the dismissal without prejudice of the FCA claims pursuant to 28 U.S.C. § 1654 or move to intervene in this action by June 30, 2003. It is **FURTHER ORDERED** that the plaintiff's common law claims of fraud, payment by mistake, and unjust enrichment are **DISMISSED WITH PREJUDICE** pursuant to Federal Rule of Civil Procedure 12(b)(1).

SO ORDERED this 23rd day of June, 2003.

s/Reggie B. Walton
United States District Judge

APPENDIX 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA
ex rel. TOD N. ROCKEFELLER,

Plaintiff,

v.

Doc. 39

Civ. No. 00-1352

WESTINGHOUSE ELECTRIC CO., WASTE ISOLATION DIV., **a division of CBS CORP.**, and GEORGE DIALS, Individually,

Defendants.

FILED
JUN 23 2003

MEMORANDUM OPINION

This matter comes before the Court upon defendant Westinghouse Electric Company's ("Westinghouse") Motion to Dismiss the plaintiff's complaint that alleges: (1) the defendants knowingly submitted or caused to submit false or fraudulent claims for payment or approval to the United States Government in violation of the False Claims Act (FCA"), 31 U.S.C. § 3729(a)(1) (2000); (2) the defendants knowingly made, used, or caused to make or use false records or statements to get a false or fraudulent claim paid or approved by the United States Government in violation of the FCA, 31 U.S.C. § 3729(a)(2); and District of Colombia common law claims of (3) fraud; (4) payment by mistake; and (5) unjust enrichment.[1] Complaint

1. The Court notes that defendant George Dials has never been properly served in this case. The Court set aside an (cont'd)

("Compl.") at 3. Specifically, Westinghouse seeks dismissal of the plaintiff's claims under the FCA asserting that a relator[2] in a qui tam FCA action cannot proceed pro se,[3] Motion to Dismiss by the Westinghouse Defendant, Statement of Points and

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1 (continued . . .)
erroneously granted default against him on March 12, 2003, because the Court concluded that the plaintiff failed to properly serve defendant Dials under either federal law, District of Colombia law, or Nevada law. See March 12, 2003 Order. Following the Court's Order vacating the default because of improper service, the plaintiff filed an affidavit on April 3, 2003, claiming that he had properly effected service on defendant Dials through his attorney. However, for essentially the same reasons already expressed by the Court in its previous Order, and because defendant Dials' attorney is not a proper agent for service of process, the plaintiff has failed to effect proper service of process on defendant Dials under Federal Rule of Civil Procedure 4(e)(2). In an April 4, 2003 letter, defendant Dials' attorney, Michael Dyson, informed the plaintiff that neither he nor his law firm were authorized to accept service of process on behalf of Mr. Dials and therfore such an attempt to effectuate service on Mr. Dials was invalid.

2. A relator is a private person suing on behalf of the United States and his or herself in a qui tam FCA action. "Qui tam is short for the Latin phrase qui tam pro domingo rege quam pro se ipso in hac parte sequitur. Th[e] English translation of this phrase means he 'who pursues this action on our Lord the King's behalf as well as his own.' There are three other qui tam statutes that remain in the United States Code: 25 U.S.C. § 81 (cause of action and share of recovery against a person contracting with the Indians in an unlawful manner); 25 U.S.C. § 201 (cause of action and share of recovery against a person violating Indian protection laws); 35 U.S.C. § 292(b) (cause of action and share of recovery against a person falsely marking patented articles)." Shekoyan v. Sibley Inter. Corp., 217 F.Supp. 2d 59, 71 n.11 (D.D.C. 2002 (Walton, J.) (internal citation omitted) (citing Vermont Agency of Natural Res. V. United States ex rel. Stevens, 529 U.S. 765, 769 n.1(2000).

3. The Court notes that the terms Pro se and pro persona (pro per) are analogous. See Black's Law Dictionary (7th Ed. 1999).

Authorities in Support of Motion by the Westinghouse Defendant Dismiss ("Def.'s Stat. of P. & A.") at 10-13, which plaintiff concedes is correct, Plaintiff's Memorandum in Opposition to Motion by the Westinghouse Defendant to Dismiss (Pl.'s Opp'n") at 3; Plaintiff's Motion for Enlargement of Time and Statement of Points and Authorities ("Pl.'s Mot. For Enl.") at 2. In addition, the defendant asserts that the plaintiff has failed to state a claim upon which relief can be granted because the plaintiff fails to allege that the defendant submitted any claims to the United States Government or that such claims, if submitted, were false. Def.'s Stat. of P. & A. at 14-16. The defendant further contends that the plaintiff's allegations fail to satisfy Rule 9(b) of the Federal Rules of Civil Procedure, which requires that fraud claims, such as those under the FCA, to be pled with particularity, id at 17-18. Finally, with respect to the plaintiff's common law claims, the defendant asserts that the plaintiff lacks standing to pursue these claims on behalf of the United States.[4] Id at 21. Upon consideration of the parties' submissions and for the reasons set forth below, the Court must grant defendant Westinghouse's motion to dismiss plaintiff Rockefeller's FCA and common law claims, because a relator in a qui tam FCA action cannot proceed pro se and the plaintiff lacks standing to pursue common law claims for injuries allegedly sustained by the United States.

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4. The plaintiff's fraud, payment by mistake, and unjust enrichment claims are collectively referred to in this opinion as the "common law claims."

I. Background

From 1992 until 1997, defendant Westinghouse contracted to operate the United States Department of Energy's ("DOE") Waste Isolation Pilot Plant nuclear repository ("WIPP") in New Mexico. Compl. At 2. The DOE employed the plaintiff from 1993 to 1997 as an environmental scientist at the WIPP. Id at 3. The plaintiff alleges that the defendant made several false claims during the course of Westinghouse's contractual relationship with the DOE. Id at 4-7. The plaintiff alleges that defendant routinely made false claims of operational costs, including overcharges for both waste disposal and recycling in fiscal year 1995. Id at 4. The plaintiff also contends that the defendant violated the FCA by continuing to use an "antiquated manual gas canister based V[olatile] O[rganic] C[ompound] monitoring" system instead of the more cost effective Fourier Transform Infrared monitoring system, which would have saved the taxpayers approximately two million dollars per year. Id at 5. The plaintiff bases his common law claims on the above false claims that were allegedly made by defendant to the United States. Id at 9-10.

Following the filing of the plaintiff's complaint, this Court gave the United States an opportunity to intervene in this case pursuant to section 3730(b)(2) of the FCA, 31 U.S.C. § 3730(b)(2), which the United States subsequently declined, The United States' Notice of Election to Decline Intervention at 1. As the Court mentioned above, the defendant subsequently moved to dismiss the case, asserting that a relator in a qui tam FCA action cannot proceed pro se. Def.'s Stat. of P. & A. at 10-13. The plaintiff, in his response to the defendant's motion conceded that he cannot proceed pro se in this case and requested sixty days to obtain the representation of an attorney. Pl's Opp'n at 3;

Pl.'s Mot. For Enl. At 2. On January 24, 2003, after failing to obtain counsel at the end of the sixty-day period, the plaintiff requested another ninety days to obtain counsel, Plaintiff's Motion for Partial Judgment as a Matter of Law at 11, which this Court granted nunc pro tunc to January 24, 2003, see May 27, 2003 Order. The plaintiff has still not retained the services of an attorney.

Against this background, the Court will address whether plaintiff has standing to bring the common law claims and, because the plaintiff has been unable to obtain counsel to represent him in this matter, the Court will also review whether the plaintiff can proceed pro se with the qui tam FCA claims he has filed.

II. Analysis

(A) Plaintiff's Common Law Claims

At the outset, this Court must address the fact that the plaintiff has failed to respond to the defendant's assertion that the plaintiff lacks standing to bring common law claims.[5] This Court's Local Rule 7.1(b) states:

> Within 11 days of the date of service or at such other time as the court may direct, an opposing party shall serve and file a memorandum of points and authorities in opposition to the motion. If such a memorandum is not filed within the prescribed time, the court may

5. The Court notes that it issued an Order granting the plaintiff an opportunity to respond to the defendant's assertion that he lacks standing to assert the common law claims. See June 9, 2003 Order. Specifically, the plaintiff has failed to address the following claims that the defendant has moved to dismiss: Count III (common law fraud); Count IV (Payment by Mistake); Count V (Unjust Enrichment). The plaintiff failed to respond to the Court's order.

treat the motion as conceded.

"It is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." *Hopkins v. Women Div., Gen. Bd. of Global Ministries*, 238 F. Supp. 2d 174, 178 (D.D.C. 2002) (Walton, J.) (citations omitted). "The District of Colombia Circuit has stated that 'the discretion to enforce . . . [R]ule [7.1(b)] lies wholly with the district court', and noted that the Circuit 'ha[s] yet to find that a district court's enforcement of this rule constituted an abuse of discretion' . . ." Id at 178 (internal citations omitted) (alteration in original). This Court has an obligation, however, to independently ensure proper subject matter jurisdiction in a case. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (holding that standing is an indispensable part of the plaintiff's case for establishing "federal jurisdiction"); *Floyd v. District of Colombia*, 129 F.3d 152, 155 (D.C. Cir. 1997) ("[The court has] an independent obligation to assure [itself] of jurisdiction . . .").

Defendant Westinghouse seeks dismissal of the plaintiff's common law claims under Federal Rule of Civil Procedure 12(b)(1), which requires that the plaintiff bear the burden of establishing by a preponderance of the evidence that the court has jurisdiction to entertain his claims. Fed.R.Civ.P. 12 (b)(1); *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001) (holding that the court has an "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority."); *Pitney Bowes, Inc. v. United StatesPostal Serv.*, 27 F. Supp. 2d 15, 18 (D.D.C. 1998); Darden v. United States, 18 Cl. Ct. 855, 859 (Cl. Ct. 1989). While the Court must

accept as true all the factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1), *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993), because the plaintiff has the burden of proof to establish jurisdiction, the "'plaintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." *Grand Lodge of Fraternal Order of Police*, 185 F. Supp. 2d at 13-14 (citation omitted). However, in deciding a 12(b)(1) motion, the Court is not limited to the allegations in the complaint but may consider "'such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction in the case.'" Id at 14 (citations omitted).

A relator in a qui tam FCA action does not have standing to assert common law claims based upon injury sustained by the United States. See *United States ex rel. Phipps v. Comprehensive Cmty. Dev. Corp.*, 152 F. Supp. 2d 443, 451-52 (S.D.N.Y. 2001) (holding that a relator lacks stand- ing to bring common law claims of fraud, payment under mistake of fact, and unjust enrichment}; *United States ex rel. Long v. SCS Bus. & Tech. Inst.*, 999 F. Supp. 78, 92 (D.D.C. 1998) (holding that relator lacks standing to bring common law unjust enrichment claim), rev'd on other grounds, 173 F.3d 870 (D.C. Cir. 1999). See generally *Lujan*, 504 U.S. at 560 (holding that a plaintiff must suffer an injury in fact in order to satisfy one of the three elements for the "constitutional minimum of standing . . . ."). Therefore, the Court lacks subject matter jurisdiction over the plaintiff's common law claims and must dismiss them pursuant to Federal Rule of Civil Procedure 12(b)(1).

(B.) Plaintiff's FCA Claims

The plaintiff concedes that he cannot proceed with his qui tam FCA claims without the representation of an attorney. See Pl's Opp'n at 3 ("Rockefeller concedes to the claim of [Westinghouse] that he cannot represent the United States on a pro per basis.") (emphasis added); Pl.'s Mot. for Enl. At 2 ("Once, however, that Rockefeller evaluated this issue presented by [Westinghouse], he agrees with the ruling in *United States ex rel. Schwartz v. TRW, Inc.*, 118 F. Supp. 2d 991 (C.D. Cal. 2000) that a pro se litigant can not represent the United States concerning a FCA lawsuit." (Emphasis added). Despite this concession, considering the scarceness of decisions on the issue, this Court will independently inquire into the subject.[6] See *Williams v. Carter*, 10 F.3d 563, 567 (8th Cir. 1993) ("Pleadings and other documents filed by pro se litigants should be treated with a degree of indulgence, in order to avoid a meritorious claim's being lost through inadvertence or misunderstanding.").

In 1863, during the Civil War, Congress enacted the FCA to "broadly . . . protect the funds and property of the Government from fraudulent claims . . . ." *Rainwater v. United States*, 356 U.S. 590, 592 (1958). The FCA allows the United States to recover against "[a]ny person who knowingly presents, or causes to be presented, to . . . the United States Government . . . a false or fraudulent claim

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6. This Court has only been able to identify three cases that have examined in any detail whether a pro se relator can represent the United States in a qui tam FCA action. See United States v. Onan, 190 F.2d 1 (8th Cir. 1951), cert. denied, 342 U.S. 869 (1951); United States ex rel. Schwartz v. TRW Inc., 118 F. Supp. 2d 991, 994 (C.D. Cal. 2000); United States ex rel. Tyler v. California, Case No. S-98-2130, 1999 WL 33456979 (E.D. Cal. Sept. 24, 1999).

for payment or approval." 31 U.S.C. § 3729(a). A FCA action may be brought by the United States or by a relator on behalf of the United States in a qui tam civil action. 31 U.S.C. § 3730(b)(1); *Vt. Agency of Natural Res. V. United States ex rel. Stevens*, 529 U.S. 765, 769 (2000). If a relator brings the action, the relator must serve the United States with a copy of the complaint and any supporting information, and allow sixty days for the United States to intervene in the action. 31 U.S.C. § 3730 (b)(2). If the United States chooses to intervene, the United States has the primary responsibility for prosecuting the action and the relator can continue as a participant in the case. 31 U.S.C. § 3730(c)(1). If the United States chooses not to intervene, the relator "shall have the right to conduct the action," subject to subsequent intervention by the United States, which a court may permit for good cause. 31 U.S.C. § 3730(c)(3). If the United States intervenes and is successful, the relator receives fifteen to twenty-five percent of the judgment, 31 U.S.C. § 3730(d)(1), and if the United States does not intervene and the relator is successful, the relator receives twenty-five to thirty percent of the judgment, 31 U.S.C. § 3730(d)(2).

1. Lay Person Representation in General

Generally, a lay person cannot represent a party in court. See 28 U.S.C. § 1654 (2000) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . . ."); *Georgiades v. Martin-Trigona*, 729 F.2d 831, 834 (D.C. Cir. 1984) (holding that a lay person cannot appear as counsel for others); Collins v. O'Brien, 208 F.2d 44, 45 (D.C. Cir. 1953) (per curiam) (same). In *Georgiades*, the District of Colombia Circuit held that a son, who was not a member of any bar, could not represent his mother

in court. 729 F.2d at 834. Similarly, in Collins, the Circuit Court held that a lay person's ability to appear pro se is "reserved to the individual." 208 F.2d at 45. In addition, other courts have held that a lay person cannot represent stockholders in a stockholder derivative suit or the class in a class action law suit, even if the lay person is one of the stockholders or class members. See, e.g., *Phillips v. Tobin*, 548 F.2d 408, 411 (2nd Cir. 1976) (holding that a stockholder cannot represent the corporation without an attorney); *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975) (holding that a qualified counsel is needed to adequately represent the interest of the class). In Phillips, the Second Circuit held that in a stockholder derivative suit, the interest being represented was that of the corporation, even though the stockholder had some interest in the suit, and thus prohibited the stockholder from representing the corporation. 548 F.2d at 411; see also *Ross v. Bernhard*, 396 U.S. 531, 538 (1970) ("[The corporation] is the real party in interest, the stockholder being at best the nominal plaintiff."). And, a class member cannot represent the class without counsel, because a class action suit affects the rights of the other members of the class. See *Oxendine*, 509 F.2d at 1407. Thus, in *Roland v. California Men's Colony*, 506 U.S. 194 (1993), the Supreme Court observed that "the lower courts have uniformly held that 28 U.S.C. § 1654 . . . does not allow corporations, partnerships, or associations to appear in federal court otherwise than by licensed counsel." Id at 202.

The relator in a qui tam FCA action, while having a stake in the lawsuit, represents the interests of the United States. *United States v. Onan*, 190 F.2d 1, 4, 6 (8th Cir. 1951) (holding that a lay person cannot represent the United States in a FCA action). While in a qui tam FCA action the relator

has the "right to conduct the action," 31 U.S.C. § 3730(c)(3), the United States remains "the real party in interest" whether it intervenes or not, *United States ex rel. Zissler v. Regents of Univ. of Minn.*, 154 F.3d 870, 872 (8th Cir. 1998) ("Even in cases where the United States has declined to intervene, the structure of the qui tam procedure, the extensive benefit flowing to the government from any recovery, and the extensive power the government has to control the litigation have been held to weigh heavily for holding that it remains the real party in interest.") (internal quotations and citations omitted). Because a relator represents the United States in a qui tam FCA action, this Court must conclude that under 28 U.S.C. § 1654 the plaintiff is not qualified as a lay person to represent the interests of the United States in court proceedings.

The similarity between the status of relators in qui tam actions and that of stockholders and class representatives supports this Court's conclusion. Like a stockholder on a stockholder derivative suit and a class member in a class action suit, a lay relator in a FCA action needs qualified legal counsel to ensure that the real party at interest, the United States, is adequately represented. The need for adequate legal representation on behalf of the United States is obviously essential. As another district court noted in considering this issue: "[a]ny determination in this case would likely be given res judicata and collateral estoppel effect against future cases." *United States ex rel. Schwartz*, 118 F. Supp. 2d at 996. Because the United States is the real party in interest, a judgment obtained by a relator may adversely affect the United States' right to "bring future actions on the same claims asserted here, even if [the United States] obtained new evidence." Id. Considering

what is at stake for the United States when a relator brings a qui tam action, representation by a lay person is inadequate to protect the interest of the United States. See Id. In this regard, courts that have considered this issue have also focused on the fact that non-lawyers are not subject to the same ethical considerations that govern the conduct of attorneys and lack the necessary skills to prosecute complicated FCA claims. Id at 995. Therefore, this Court concludes that a pro se plain- tiff, absent explicit statutory authorization, is unable to represent the interests of the United States in a qui tam action.[7]

2. Statutory Authorization for Pro Se Representation

28 U.S.C. § 1654 provides that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." Thus, lay persons have a statutory right to represent themselves in cases that are brought in this Court. However, an exhaustive search of the United States Code has failed to reveal any statutory authority for lay representation of another person or a non-person entity in federal court proceedings. See *Rowland*, 506 U.S. at 202. As one Circuit Court noted, "[t]he federal courts have consistently rejected attempts at third-party lay representation." *Herrara-Venegras v. Sanchez-Rivera*, 618 F.2d 41, 42 (1st Cir. 1982).

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7. Even if the United States desired to permit the plaintiff to represent its interest in court by declining to intervene in the FCA action, it is quite dubious whether the government could do so. See Georgiades, 729 F.2d at 834 (holding that a mother cannot choose to have her non-attorney son represent her in court).

This Court's research has revealed only one subject area where Congress has expressly authorized third-party representation in a federal proceeding by a lay person. See 42 U.S.C. § 406(a)(1) (2000) (authorizing the Commissioner of Social Security to recognize "agents or other persons, other than attorneys . . . [to] represent[ ]claimants before the Commissioner of Social Security . . ."). And in this one subject area, some courts have allowed non-attorney parents to represent their minor child in a federal court to challenge the Commissioner of Social Security's decision to deny supplemental security income ("SSI") benefits to their minor child. See e.g., *Machadio v. Apfel*, 276 F.3d 103, 107 (2nd Cir. 2002; *Harris v. Apfel*, 209 F.3d 413, 417 (5th Cir. 2000). The *Harris* Court discussed several reasons for allowing non-attorney parents to represent their minor child in a SSI appeal: (1) a minor child in a family applying for SSI benefits usually cannot afford to hire an attorney; (2) the court independently reviews all the facts in a SSI appeal, thereby sufficiently protecting a minor child's interest; (3) SSI appeals are not subject to abuse of frivolous claims; and (4) the SSI payments to a minor child are paid to the parent or guardian. See *Harris*, 209 F.3d at 416. Moreover, the Second and Fifth Circuits have relied upon the fact that in the context of a SSI appeal, the interest of the minor child plaintiff and the parents are essentially the same, *Machadio*, 276 F.3d at 107; *Harris*, 209 F.3d at 416, as the Second Circuit commented that the parents of a minor child's "interest is squarely at stake in a SSI appeal, *Machadio*, 276 F.3d at 107. These unique reasons for allowing non-attorney parents to represent their minor children in SSI appeals do not extend to relators in a FCA case. In addition, as this Court has already explained, the United States remains

the "real party in interest" in a FCA action. *United States ex rel. Zissler*, 154 F.3d at 872. Furthermore, while the Fifth Circuit found that a minor child's interest is adequately protected by a court's independent review of all of the facts in a SSI appeal, in the FCA context a lay person relator lacks the ability to adequately protect the interests of the United States. See *United States ex rel. Schwartz*, 118 F. Supp. 2d at 995 ("[T]he [pro se relator's] lack of skill is also an issue of concern in cases as complicated as qui tam actions.") (emphasis added). Therefore, this Court must conclude that third party lay representation is not permissible in the FCA context, because the FCA does not specifically authorize it and there have been no policy reasons for creating an exception to the general proscription against third party lay representation.

3. Partial Assignment of the Damage Claim

Having concluded that the plaintiff is unable to proceed pro se on behalf of the government on the FCA claims, the Court must now examine whether the plaintiff can bifurcate his claims from the government's claims and proceed pro se solely on his claims. It is well understood that the FCA partially assigns the United States' damage claims to a relator. See *Vt. Agency of Natural Res.*, 529 U.S. 773, 774 n.4. Generally, a partial assignment gives the assignee the rights to the part of the claim that is assigned, as if the part assigned is a separate right. See Restatement (Second) of Contract § 326 (1981). Accordingly, a partial assignee can generally sue to recover his or her part of the claim. See

Restatement (Second) of Contract § 326 cmt. b.[8]

Despite the manner in which partial assignments are generally construed, in the context of the FCA, the partial assignment to a relator is conditioned on the United States receiving at least seventy percent of any recovery obtained from the FCA violator. 31 U.S.C. § 3730(d)(2). The purpose of the qui tam provision of the FCA is to enlist the help of private citizens in recovering government funds lost by fraud. See S. Rep. No. 99-345, at 2 (1986). Although a relator in such suits, regardless of whether the United States intervenes, receives some portion of the judgment, such reward is merely an incentive to encourage more people to bring meritorious FCA claims in order to increase the rate of recovery by the United States. Id. ("[The 1986 amendment to the FCA] increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government."). The United States is always entitled in a FCA action to receive a portion of any funds that are recovered. 31 U.S.C. § 3730(d)(1)-(2). The idea that a relator can independently pursue what would amount to his or her personal part of a FCA lawsuit without affecting the United States' rights in the action is wholly inconsistent with the purpose behind the FCA. See id at 1 ("The purpose of [the 1986 amendment] is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government.") (emphasis added).

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8. Based on this reasoning, the court in United States ex rel. Trice, No. CS-96-0171-WFN, 2000 U.S. Dist. Lexis 8838 (E.D. Wa 2000), allowed a relator to proceed pro se. While this Court would agree with the Trice Court that the assignment, be it partial or complete, creates sufficient standing for the pro se plaintiff to sue, id., this Court is unable to agree with the Trice Court's conclusion that a pro se relator can represent the United States in a court action, even when there is a partial assignment, for the reasons expressed above.

An FCA claim remains the interest of the United States, even if it chooses not to intervene in an action brought by a relator. See 31 U.S.C. § 3730 (d)(2). Thus, the interest of the United States is always at risk in a FCA case, regardless of whether it chooses to intervene or not. 31 U.S.C. § 3730 (b)(1) ("A person may bring a [FCA] action . . . for the person and for the United States Government. The action shall be brought in the name of the Government . . .") (emphasis added). In light of the purposes underlying the enactment of the FCA and the 1986 amendment thereof, and the language of the statute itself, this Court concludes that the plaintiff is unable to bifurcate an FCA claim so as to permit him as a relator to pursue his own independent claim that is totally separate from the United States' interest in that claim.

III. Conclusion

For the reasons set forth above, the Court must grant the defendant's motion to dismiss the plaintiff's FCA claims pursuant to 28 U.S.C. § 1654 because as the plaintiff concedes, a pro se party cannot represent the interests of the United States. In addition, the plaintiff lacks standing to bring his common law claims because an individual is unable to sue for injuries suffered by the United States and therefore these claims will be dismissed pursuant to Federal Rule of Civil Procedure 12 (b) (1). However, pursuant to a previous order entered in this case, the Court will not dismiss this case until written consent to do so is received from the United States. May 29, 2001 Order; see 31 U.S.C. § 3730(b)(1). While the Court finds that dismissal of this case is appropriate, upon receipt of the written consent from the government, the Court will dismiss the FCA claims without prejudice so that the United States, or the plaintiff with an

attorney, may pursue this action in the future. See United States ex rel. Schwartz, 118 F. Supp. 2d at 996 (dismissing case without prejudice in an order to allow the plaintiff to seek representation by counsel). However, should the United States desire to intervene[9] instead of consenting to the dismissal, the Court will consider the other grounds asserted in the defendant's motion to dismiss.[10] In any event, the plaintiff's common law claims are dismissed with prejudice.[11]

SO ORDERED this 23rd day of June, 2003.

s/Reggie B. Walton
United States District Court Judge

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9. When the United States seeks to intervene in a FCA action initiated by a relator during the course of the litigation, after having declined to do so within the initial sixty-day deadline after receiving the complaint and the other statutorily required documentation, the U.S. must make a showing of good cause to enter the case. 31 U.S.C. § 3730(b)(2), (c)(3). However, in this situation, in which the case is going to be dismissed because the lay relator has not retained an attorney to assist in the prosecution of the action, it is unclear whether the United States must still make a good cause showing to intervene in the case. If the government moves to intervene in this case, the Court will address this issue at that time.

10. Defendant Westinghouse also seeks to dismiss the plaintiff's FCA claims on the grounds that: (1) the plaintiff has failed to allege fraud with particularity; (2) the plaintiff's FCA claims are based on prior public disclosure; and (3) the government knew about the alleged false claims.

11. An Order consistent with the Court's ruling accompanies this Memorandum Opinion.

APPENDIX 6

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA ex rel. TOD N. ROCKEFELLER, Plaintiffs / Appellants	}	FILED
v.	}	Case No. 03 - 7120
WESTINGHOUSE, WASTE ISOLATION DIV., a div.of CBS Corp., and George Dials, Indiv., Defendants / Appellees.	}	USDC No. 00 - 1352

Petition for Rehearing by the Panel
and Petition for Rehearing En Banc

I. Introduction

This instant Petition will detail below that, due to mistakes and an abuse of discretion of the district court, concerning its denial of Appellant's Motion for Enlargement of Time (doc. 41), the district court's Order, filed on June 26th, 2003 (henceforth "6/26 Order") dismissing 00-1352 is invalid. Consequently, this Court's Panel Decision filed on January 21st, 2004 (henceforth "1/21 PD") dismissing Appeal No. 03-7120 will be shown to conflict with decisions of the Supreme Court and the Ninth Circuit concerning a *pro se* relator having standing to prosecute a False Claims Act ("FCA") suit.

In addition, this Court had listed the Appellee on said Order as "Washington TRU Solutions LLC and George Dials, Individually." Appellant had thoroughly detailed, within his Motion for Sanctions [filed on October 17th, 2003] to

this Court, that **Appellee is properly CBS Corporation d/b/a Westinghouse as captioned above.** Petitioner-Appellant is filing a combined pleading as also captioned above. See DC Cir. HdBk at 57. Petitioner was a Physical Scientist [GS 1301-13] at the United States ("U.S.") Department of Energy's ("DOE's") Waste Isolation Pilot Plant ("WIPP"), which is a repository for defense program generated transuranic nuclear waste. Petitioner is simply just an honest scientist who was trying to take measures at the WIPP Project to accomplish its mission in a cost-effective and safe manner. The 1/21 PD in question is attached as "Addendum I ".

II. The District Court's 6/26 Order

The district court had issued an order to Appellant, pursuant to *Fox v. Strickland*, 837 F.2d 507, 509 (D.C. Cir. 1988), to allow "an additional opportunity to respond to any assertions contained in the defendant's Motion to Dismiss that he has failed to address in his previously filed responses, . . ." doc. 38 at 1. However, doc. 38 allowed Appellant only ten days from the date of such Order [June 10th, 2003] till June 20th, 2003 to respond. The district court itself cited a case that described "qui tam actions" as "complicated." doc. 39 at 12, 13. In two other cases of Appellant with the same court as 00-1352 [01-2627 & 03-1240] *Fox* Orders were issued which gave an additional "thirty (30) days" from the date of such Orders to respond.

Due to the circumstances above, and the fact that Appellant had spent considerable time acquiring several hundred cases related to the FCA, Appellant needed more time to review so many cases to be able to formulate a response. Appellant filed a motion (doc. 41) to extend his time to respond only a meager seventeen (17) calendar days till July 7th, 2003. Such motion of Appellant was

filed on June 18th, 2003 prior to his June 20th deadline above. The district court started out with a mistake of dismissing a portion of Appellant's Complaint [00-1352] on June 23rd, 2003 without giving consideration to the timely motion filed on June 18th, 2003 above.

Next, the district court abused its discretion by dismissing the balance of Appellant's Complaint [00-1352] with the 6/26 Order (doc. 44), while also issuing another Order (doc. 43) the same day [6/26/03] denying Appellant's motion (doc. 41) for additional time to respond. The district court noted that Appellant has "become aware of case law", but that "he has failed to cite any authority or arcticulate any legal theory" with "respect" to his "claims." doc. 43 at 1, 2. The denial of Appellant's timely motion (doc. 41) with a claim that he had not supported his request for additional time to respond with "any authority" or any "legal theory", is without a doubt a very bogus claim, and a clear violation of this Court's *Fox* precedent that the district court itself had based its own Order (doc. 38) upon. The *Fox* precedent of this Court does NOT specify that a *pro se* party must specify legal authorities or theories to obtain additional time to respond to a motion to dismiss (emphasis added). This is a very clear error of law of the district court which is inconsistent with the due process of law. The Supreme Court. has ruled that a court is supposed to be forbidden to violate a party's due process rights. See *Davis v. Passman*, 442 U.S. 228, 234 (1979).

The Supreme Court describes the "abuse of discretion standard" by ruling that: "A district court, by definition, abuses its discretion when it makes an error of law." See *Koon v. United States*, 518 U.S. 81, 100 (1996). A Rule 60(b) motion can result in relief from a judgment or order for a "(1) mistake" or "(5) the judgment . . . is no longer

equitable that the judgment should have prospective application; . . ." See Fed.R.Civ.P. 60(b). The 6/26 Order has been demonstrated above to include a mistake and to be inequitable. The Tenth Circuit has ruled that a judgment is void "if the court which rendered it . . . acted in a manner inconsistent with due process of law. 11 Wright and Miller, Federal Practice and Procedure § 2862, at 199, 200." See *In Re: Four Seasons Securities Laws Litigation v. State of Ohio*, 502 F.2d 834, 842 (10th Cir.1974). The 6/26 Order of the district court is both an abuse of discretion and invalid. Therefore, the merits of the August 5th, 2003 Order (doc. 48) denying Appellant's Motion for Reconsideration (doc. 45) are before this Court.

III. The Panel Decision [1/21 PD]

Appellant will demonstrate below that the 1/21 PD, by "holding that qui tam relators [such as Appellant] may not proceed pro se", conflicts with the Supreme Court ruling in *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765 (2000), and the Ninth Circuit's ruling in *United States ex rel. Kelly v. The Boeing Company*, 9 F.3d 743 (9th Cir. 1993). A **question of exceptional importance** is also presented to this Court within this instant Petition. FRAP 35(b)(1)(B) requires that: "a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue."

The 1/21 PD of this Court relies upon what the district court stated concerning a *pro se* relator prosecuting a FCA action. The district court claimed the following in this regard:

> ". . . in the FCA context a lay person relator lacks the ability to adequately protect the interests of the United States.

> See *United States ex rel. Schwartz*, 118 F.Supp.2d at 995 ("[T]he [pro se relator's] lack of skill is also an issue of concern in cases as complicated as qui tam actions.") (emphasis added). Therefore, this Court must conclude that third party lay representation is not permissible in the FCA context, because the FCA does not specifically authorize it and there are no policy reasons for creating an exception to the general proscription against third party lay representation."

See doc. 39 at 12, 13. In addition, the district court also ruled that:

> ". . ., the court in *United States ex rel. Trice*, No. CS-96-0171-WFN, 2000 U.S. Dist. Lexis 8838 (E.D. Wa 2000), allowed a relator to proceed pro se. While this Court would agree with the *Trice* Court that the assignment, be it partial or complete, creates sufficient standing for the pro se plaintiff to sue, id., this Court is unable to agree with the *Trice* Court's conclusion that a pro se relator can represent the United States in a court action, even when there is a partial assignment, for the reasons expressed above."

See doc. 39 at 13 n.8. Besides the claim that Appellant is not qualified to conduct the FCA litigation, the district court also relies on a "partial assignment" theory of a FCA damages claim that allegedly allows "a partial assignee" only to sue for their "part of the claim." See *Id* at 13. Lastly, the district court claimed the following within its August 5th, 2003 Order denying Appellant's Motion for Reconsideration:

> "The plaintiff also cites a number of

> cases where a pro se relator proceeded with the FCA claim where the United States did not intervene. . . . Therefore, the fact that pro se relators in these cases prosecuted their FCA claim without an attorney does not provide support for the plaintiff's argument that lay relators proceeding pro se can, as a matter of law, represent the interest of the United States in court without the assistance of an attorney."

See doc. 48 at 3.

Appellant had very clearly demonstrated to this Court that the three justifications of the district court above, used to deny a *pro se* realtor [such as Appellant] their standing to prosecute a FCA claim, do indeed conflict with the rulings in the *Vermont* case of the Supreme Court, and *Kelly* case of the Ninth Circuit as demonstrated below:

> "Within Appellee's Motion for Summary Affirmance (henceforth "MfSA") dated October 20th, 2003, claims are made concerning the standing of Appellant to sue which will be responded to below. Appellee repeatedly claims that a non-lawyer *pro se* relator can not prosecute a False Claims Act ("FCA") suit representing the United States ("U.S."). Appellee relies upon a 1951 8th Circuit case for this claim [*U.S. v. Onan*, 190 F.2d 1] and a California district court that also relies upon *Onan* [*U.S. ex rel. Schwartz v. TRW, Inc.*, 118 F.Supp. 2d 991, 994 (C.D. Cal. 2000)]. Appellant had outlined within his Statement of Issues to this Court that the ruling in *Onan* does not comport with the legislative intent of the 1986 Amendments of the FCA. See "First Issue"

Appellee has failed to specifically address this issue within the MfSA.

The FCA was drastically weakened by the 1943 Amendments made to the Act to facilitate, or not to interfere with, the WWII war effort. At the time, the said amendments of the FCA seemed to be a necessity. Four decades after WWII, however, the defects of the FCA became very apparent to Congress which resulted in the 1986 Amendments to the FCA to strengthen the Act. See *D.J. Findley v. FPC - Boron Employees' Club, et al.*, 105 F.3d 675, 680 (D.C. Cir. 1997). The 1986 FCA Amendments were designed to "encourage more private enforcement suits." See *Id.*

The 8th Circuit has also altered its viewpoint towards the FCA since both the ruling in the *Onan* case and the Act's 1986 Amendment as follows:

"The relator is "essentially a self-appointed private attorney general," *U.S. ex rel. Milam*, 961 F.2d at 49, whose involvement [is] in a representational capacity . . ."

"*Marvin v. Trout*, 199 U.S. 212, 225 (1905)(explaining that qui tam actions "have been in existence for hundreds of years in England, and in this country ever since the founding of our Government.")."

See *U.S. ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870, 872 (8th Cir. 1998). Appellant contends that the rulings made within the *Onan* and

Schwartz (**Jan. 18th, 2000**) cases are not valid and have been overruled by the Supreme Court ("Sup.Ct.") opinion within *Vermont Agency of Natural Resources v. U.S.*, 529 U.S. 765 (**May, 22nd, 2000**). This Circuit made the following comment concerning the *Vermont* case:

"We are aware that the Supreme Court recently expanded the scope of its review in *Vermont*, . . . , to consider whether "a private person [has] standing under Article III to litigate claims of fraud upon the government.""

See *Settlemire v. The District of Columbia*, No. 98-7180 at n. 3 (D.C. Cir., December 21st, 1999). Since the *Settlemire* case, the Sup.Ct. ruled that there is "no room for doubt that a qui tam relator under the FCA has Article III standing." See *Vermont*, 529 U.S. at 777. A court within the 9th Circuit ruled that a non-lawyer pro se relator had standing to sue and prosecute a FCA case on behalf of the U.S.. See *U.S. ex rel. Trice v. Westinghouse Hanford Co.*, No. CS-96-0171 WFN, 2000 U.S. Dist. LEXIS 8838 (E.D. Wa., March 1st, 2000). The *Trice* court ruled the following within its Section VI on "Standing for *Pro Se Qui Tam* Plaintiffs":

". . ., the 9th Cir. has held in great detail "that the FCA effectively assigns the government's claims to qui tam plaintiffs . . . who then may sue based upon injury to the federal treasury." *U.S. ex rel. Kelly v. The Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993) . . . (holding that qui

tam plaintiffs have Article III standing)."

". . . federal courts routinely find fraud claims are assignable, and federal courts consistently recognize that an assignee of a fraud claim can assert the claim. *Id* **The court was unconcerned** that the FCA statute does not use the term "assignment.". . . or **that the qui tam plaintiff is assigned only part of the government's claim**. *Id* "

(emphasis added). The *Trice* court further explains its basis for ruling that a non-lawyer in a FCA case can prosecute:

". . . the FCA meticulously addresses the procedure by which a qui tam plaintiff may bring an action. Congress easily could have inserted a provision requiring a qui tam plaintiff to retain counsel. Congress even could have forsaken qui tam standing altogether. Congress did neither of these." See *Id*

The *Trice* court also addressed the ruling in the *Onan* case:

"This holding was based on the old FCA, 31 U.S.C § 232. The FCA subsequently has been amended five times. Also, this decision was rendered far before the 9th Cir. finding that an FCA claim is an assignable fraud claim."
"Assignment of a claim places the assignee in the shoes of the assignor. Essentially, the claim becomes the assignee's claim. An assignee may

litigate his own claim if he wishes. In light of the 9th Cir.'s view that FCA claims are fraud claims assigned by the Government to the private litigant when the Government declines to intervene, *Trice* is allowed to proceed pro se."

See *Id* The district court actually agreed with the ruling of the *Trice* court that a qui tam relator has standing to sue, but disagreed that the relator could prosecute the case without counsel because of the "Partial Assignment of the Damages Claim." See doc. 39 at 13. The distinction between a full and partial assignment of a fraud claim by the district court conflicts with the 9th Cir.'s ruling in the *Kelly* case quoted above, and the Sup.Ct.'s opinion in *Vermont*. In the *Vermont* case, the Sup.Ct. does not distinguish any limitation upon the standing of a *qui tam* plaintiff to litigate a FCA case due to a partial assignment by stating that:

"We believe, . . . in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor."

See *Vermont*, 529 U.S. at 773. The Sup. Ct. does NOT specify, as the district court does, that "a partial assignment gives the assignee the rights to the part of the claim that is assigned, ... See Restatement (Second) of Contract § 326." See doc. 39 at 13. The partial assignment theory of the district court may apply to contracts, but NOT to fraud

claims of the FCA or informer statutes that have been in place at the time our nation was born and many years after. See *Vermont*, 529 U.S. at 776 notes 5, 6, & 7. Many of these informer statutes allowed the informer themselves to prosecute:

"*cf.* Act of Apr. 30, 1790 ch. 9, §§ 16, 17, 1 Stat. 116 (**allowing informer to conduct prosecution**, and receive half of fine [partial assignment of claim], for criminal larceny or receipt of stolen goods.)"

See *Id* at n. 6 In addition, the Sup.Ct. has also pointed out the following:

"In past centuries in England {24}, in the American colonies, and in the United States {25}, private persons regularly prosecuted criminal cases. The interest in punishing the defendant and deterring violations of law by the defendant and others was sufficient to support the "standing" of the private prosecutor . . ."

See *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 127-28 n. 24, 25."

See Appellant's Response to Appellee's Motion for Summary Affirmance at 2 through 5, dated October 31st, 2003 that was filed with this Court.

IV. Conclusion

Private prosecution of crimes, and the history of informer statutes whereby the informer themself represents the U.S., spans centuries as detailed above. All of what Appellant has outlined clearly indicates that the district court's dismissal of this case upon its partial assignment theory, related to contracts, does NOT apply to the prosecution of fraudulent claims under the FCA and must be reversed. In addition, the *Kelly* case describes the purpose of the 1986 Amendments to the FCA by stating that:

> ". . . Congress sought to encourage more private enforcement of the FCA because "detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity.""

See *Kelly*, 9 F.3d at 745 n.2 Appellant was a knowledgeable scientist who was familiar enough, and skilled enough, with the presentation of evidence in this case of fraudulent activities of Appellee , to successfully accomplish the establishment of a significant amount of FCA liability. See doc. nos. 30 and 32. Finally, Appellee has made several knowingly false representations to this Court [as Appellant has clearly outlined within his Motion for Sanctions (filed 10/17/03)], and therefore must lose all credibility, and that "no other conclusion is possible." See *Mesarosh v. U.S.*, 352 U.S. 1, 9 (1956).

Prayer for Relief

Petitioner prays that this Court issues an order granting this instant Petition for the justifications outlined above. Such an order would be a very large step towards vindicating Petitioner's rights, and address money damages suffered by the United States, due to the admitted fraudulent claims of Appellee.

Respectfully submitted,

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